

Bathaee :: Dunne :: LLP

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April 14, 2023

Via CM/ECF

Re: Klein v. Meta Platforms, Inc., No. 3:20-cv-08570-JD (N.D. Cal.)

Dear Judge Donato:

Advertiser Plaintiffs (“Advertisers”) in the *Klein* litigation respectfully request that the Court compel Reed Hastings, the founder and ex-CEO of Netflix and a longtime member of Defendant Meta Platforms, Inc.’s (“Facebook”) board of directors, to produce documents in response to a subpoena served upon him several months ago. Hastings has refused to produce any documents in response to Advertisers’ subpoena, even though Advertisers’ requests are plainly relevant and proportional, given the factual and procedural context. Advertisers and Hastings’s counsel have exchanged multiple letters, have met and conferred, and are at impasse.

* * *

For nearly a decade, Netflix and Facebook enjoyed a special relationship. Netflix bought [REDACTED] Facebook ads; [REDACTED]

It is no great mystery how this close partnership developed, and who was its steward: from 2011-2019, Netflix’s then-CEO Hastings sat on Facebook’s [REDACTED]

In June 2011, Hastings joined Facebook’s board of directors. PALM-009329663. Facebook was, at the time, a private company led by Zuckerberg, founder and CEO, and Sandberg, COO. *Id.* [REDACTED]

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[REDACTED]

[REDACTED]

By late 2015, Facebook had other concerns in its ads business. The demise of its public developer Platform had left a companywide dearth of “signals”—data used as inputs to targeting and ranking models—needed to train Facebook’s ML/AI systems that personalize ads and other content for users. FAC ¶¶ 316-33.

[REDACTED] Against this backdrop, Facebook began entering distinct “verticals” to obtain signals for the AI/ML systems powering its ad business. FAC ¶¶ 316-393. One of these new verticals was streaming video, with a product called Facebook Watch. *Id.* ¶¶ 379-93. Over the course of 2016 and 2017, Facebook spent more than a billion dollars on its new Watch product, eventually signing deals for original, premium video content starring Elizabeth Olsen, Bill Murray, and Catherine Zeta-Jones. FAC ¶¶ 488-98. By mid-2017, Facebook and Netflix were approaching potentially ruinous competition in streaming video. Employees, industry observers, and the press all took notice. At a May 2017 Recode conference, Hastings was asked about competition between Facebook and Netflix and publicly downplayed the situation, saying, “[t]here’s not a big conflict yet. . . . We’re not bidding on the same shows.”

In Facebook’s Watch division itself, business continued as usual.

[REDACTED]
But behind the scenes, an agreement was being struck.

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[REDACTED] Facebook began dismantling the multi-billion dollar original content business it had built over the past two years, suddenly withdrawing from direct competition with Netflix in video streaming. FAC ¶¶ 525-35.

Amidst the sudden pivot in Facebook's video strategy, the data partnership between Netflix and Facebook reached new heights. Facebook and Netflix entered into a series of new data-sharing agreements between August 2017 and April 2018, FAC ¶¶ 509-512, and another in July 2018, *id.* ¶¶ 515-22.

[REDACTED] These new agreements provided Facebook's ad targeting systems with rich signals from Netflix, including "cross-device intent signals," while expressly unhooking Watch from the benefits of this bounty. *Id.* ¶¶ 515-24.

[REDACTED]

[REDACTED]

[REDACTED] In April 2019, Hastings left Facebook's board.

[REDACTED]

Despite the above indications that Hastings personally directed Facebook/Netflix relations, including through seemingly near-constant communications with Facebook executives like [REDACTED], Facebook has in fact produced comparatively few communications involving Hastings, at one point telling Advertisers (who requested him as a Facebook custodian) that Hastings had too few Facebook-custodial documents to merit such a designation. Similarly, when Advertisers subpoenaed Netflix specifically requesting Hastings's custodial communications with and about Facebook, Netflix produced essentially nothing. Advertisers know from circumstantial evidence that Hastings spoke, including in writing, regularly [REDACTED]—often from his personal email and likely using his personal mobile devices—yet no production of any such documents has been made by either of Hastings's companies. Left with no other alternative, Advertisers subpoenaed Hastings directly for documents (Ex. A), and were met with a flat refusal to produce **anything** (Ex. B).¹ In view of the facts set forth above, and the uncontroversial Rule 45 document production standard, *see, e.g., Erickson v. Builder Advisor Grp. LLC*, 2022 WL 1265823, at *1-2 (N.D. Cal. Apr. 28, 2022), Advertisers respectfully submit that Hastings should be compelled to produce documents responsive to their subpoena to him.

¹ Advertisers have also sought Hastings's deposition. He has moved to quash it. Dkt. 505.

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Respectfully submitted,

By: /s/ Brian J. Dunne
*On Behalf of Interim Co-Lead Counsel for the
Advertiser Classes*

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FILER ATTESTATION

I am the ECF user who is filing this document. Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that each of the other signatories have concurred in the filing of the document.

Dated: April 14, 2023

By: /s/ Brian J. Dunne
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